No. 45.

Brief of Wheeler with Appellee.

Filed Jan. 25, 1898.

Supreme Court of the United States.

45.

JOSEPHINE W. WUPPERMAN,

Appellant,

vs.

The Steamship "CARIB PRINCE," her Engines, &c.,
ERNEST LEGGE, Claimant,

Appellee.

Supplementary Brief Submitted by leave of this Court in Support of the Decree below.

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Supreme Court of the United States.

OCTOBER TERM, 1897.

JOSEPHINE W. WUPPERMAN,
Appellant,

against

THE STEAMSHIP "CARIB PRINCE," her Engines, &c., ERNEST LEGGE, Claimant,
Appellee.

No. 45.

SUPPLEMENTARY BRIEF SUBMITTED BY LEAVE OF THIS COURT IN SUPPORT OF THE DECREE BELOW.

Statement

This cause was brought here by *certiorari*. The decree of the District Court, dismissing the libel was affirmed unanimously by the Circuit Court of Appeals. The case is reported in the latter Court, 35 U. S. App., 390, 15 C. C. A., 385, 68 Fed. Rep., 254, and in the former Court, 63 Fed. Rep., 266.

The libel was brought to recover for injury to cargo. This was occasioned by the breaking of a rivet in the collision bulkhead, and the consequent leakage of water from the ballast tank in the forepeak.

The defenses were that the owner exercised due diligence to make the ship seaworthy, and was, therefore, exempt from liability under the Harter Act, that the defect in the rivet was latent, and, therefore, within the exceptions of the bill of lading, and that the defect was not such as to make the vessel unseaworthy.

This brief is submitted on behalf of shipowners not parties to this record, but interested to support the decree. Leave was granted November 1, 1897.

First.

History of the Harter Act.

I.—The Harter Act, as finally adopted, was not hasty legislation. It was the outgrowth of a controversy between shipowners, shippers and underwriters, that had been going on, at least since 1880. This had been brought before the Association for the Reform and Codification of the Law of Nations; before the Chambers of Commerce and Exchanges in the great cities of America, England and Germany. Representations had been made to the British Government in reference to proposed legislation to settle the controversy, and bills with a similar object had been introduced in Congress. The earlier history of this controversy is given in Chapter 3 of Wendt's Papers on Marine Legislation, 3d Edition.

A careful examination of this discussion as to the form of bills of lading will show :

1. That the main controversy has been whether the carrier should be allowed under any circumstances to exempt himself from liability for the negligence of the master or mariners.

2. That no objection has ever been made to exemption from liability for injury caused by latent defects, if the carrier use due diligence to discover and guard against them.

Indeed, it may justly be said that until the decision of this Court in the *Caledonia*, it was generally supposed by commercial men that the carrier was not liable for latent defects in the hull or machinery, which diligence could not discover, even though the word, "latent," was omitted in the bill of lading.

In the various forms of bills of lading which were proposed by the shippers and commercial bodies which they had organized in different cities, a clause is to be found exempting the carrier "from any latent defect in hull or machinery."

> See the New York Produce Exchange Bill of Lading printed in full in Wheeler on Common Carriers, pp. 350–352.

In all the discussions reported in Wendt, no objection is made to this clause.

The clause in the Produce Exchange Bill of Lading, which caused most debate was that which exempted the carrier from liability for losses occasioned by "negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowners, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager."

A Congress assembled at Hamburg, in which ship-

owners were not represented, reported that it was inexpedient to recommend the adoption of such a clause. Another, and more representative Congress assembled later in London, reported in the opposite direction. The argument on one side and the other may be briefly summarized thus:

On the part of the shippers it was contended that the shipper had no voice in the selection of the captain and crew, and that the shipowner should therefore be responsible for their negligence, and that this would tend to insure greater caution on his part, and that the carriers had a virtual monopoly of the carrying trade.

On behalf of the carrier it was argued that the selection of the master and mariners was not altogether in his hands, that the governments of the different commercial countries had instituted examinations as to the qualifications of mariners, and that no person could be appointed to a position as officer or engineer who had not passed such an examination; and that there was no such thing as a monopoly of carriage by sea. In this respect transportation by sea differed from transportation by land. No railroad could be built without obtaining a charter from the Government, and without obtaining a right of way in the manner pointed out by law, whereas anyone could become a carrier by sea who had the capital necessary to furnish and equip a ship. In point of fact, a great deal of the carrying trade was in the hands of independent owners, who competed with the great lines. And above all the argument was pressed that there had been a complete change in the conditions under which the carrying trade was conducted; that in the nature of the case the owners of ships could not exercise that personal supervision over persons employed by them that individual owners formerly could, especially when (as was often the case) the captain himself was one of such owners.

No objection was made, during all the discussion, to the insertion of a clause exempting the shipowner from liability for latent defects, provided due diligence was used in the inspection of the ship. The point afterwards raised by the ingenuity of counsel that a "latent defect" meant a defect arising after the commencement of the voyage, was never suggested. Obviously all the disputants assumed that "a latent defect" meant a defect actually existing at the beginning of the voyage, but not discoverable by due diligence. Where a subject has been so thoroughly canvassed as was this, failure to suggest an objection is the strongest possible evidence of approval.

The result of these manifold discussions was the compromise embodied in the Harter Act.

II.—When that Act was introduced in the House of Representatives in 1892, it prohibited the insertion of this latter clause. It was drawn in the interest of shippers exclusively. The exemptions in Section 3 of the bill as introduced, did not help the carrier, for they were substantially those that existed at common law. An amendment to the third section was inserted by the House Committee on Interstate Commerce and Navigation, which also was really in the interest of shippers. That is to say, it allowed the carrier to agree "that the vessel may render services to property in distress afloat, and tow the same to the nearest and most convenient port of safety, without incurring penalties for deviation in rendering such service."

It had been held that in the absence of such a stipulation it would be a deviation to render services for the saving of property at sea.

It may be noted that the only debate in the House, before the bill went to the Senate, took place during the morning hour; that it largely consisted of invective against the

clause common in foreign bills of lading, that the contract should be judged by the law of Great Britain or of some other country named therein, interspersed with collateral remarks as to the advantage of high tariff. It certainly could not be called a serious debate upon the merits of the important questions involved in the bill, and does not throw the slightest light upon the construction to be given to it.

The bill then went to the Senate, and a full and careful hearing took place before the Senate Committee on Commerce. Before this committee appeared the representatives of the shipowners, shippers, and the underwriters. Indeed, all the great commercial bodies were represented. Mr. Frye in reporting the bill to the Senate, stated that in its amended form it had met the approval of all parties in interest, and added: "It had the unanimous agreement, after long hearings, of the Committee on Commerce."

24 Congressional Record, Part 2, p. 1180.

An examination of the amendments reported by the Senate Committee and adopted by the Senate (which were afterwards concurred in by the House) shows that the defect in the language which is to be found in Section 2 as printed in the Statutes at Large (27 Stat. at Large, 445) is an error in engrossing. As passed by the Senate, and finally by the House, the second section read as follows:

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby

the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided."

Report of Committee, *Ibid*, 1180.

It is to be observed that when this Court quote the Act in The *Delaware*, 161 U. S., 470, they quote it as as it is thus stated, although the word *to* is omitted in the printed Statutes at Large.

Another case (No. 83) is pending in this Court in which the right of the carrier to limit the amount of his liability is drawn in question. That question does not arise in this case, and nothing further will be said upon it. Irrespective of this, what are the provisions of the Harter Act?

1. The first section prohibits the shipowner from inserting any agreement whereby he "shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery, of any and all lawful merchandise or property committed to its or their charge."

2. The second prohibits the shipowner from inserting any clause whereby his obligation to exercise due diligence to equip the vessel and to make her seaworthy, or whereby the obligations of his servants to carefully handle and stow her cargo, and to care for and properly deliver the same, shall be lessened, weakened or avoided.

The concession by the shipper and underwriter involved in this second section, is a limitation of the absolute warranty of seaworthiness which existed at common law, both as to the shipper and the underwriter.

3. The third section provides that if the owner shall "exercise due diligence to make the said vessel in all re-

spects seaworthy and properly manned, equipped and supplied," neither she nor her owner shall "be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel." The clause declaratory of the common law as to perils of the sea, the act of God, &c., is retained, as well as the clause that the vessel may deviate to save property as well as life.

4. The owner is required to issue bills of lading, stating among other things, the marks and apparent condition of the goods shipped.

5. The violation of the statute is made a misdemeanor punishable by fine not exceeding two thousand dollars.

6. The provisions of the statute relating to limitation of liability by the surrender of the vessel and freight are retained.

7. Sections 1 and 4 are declared not applicable "to the transportation of live animals."

It will be seen from this summary of the act that very important concessions were made by all parties. It is not surprising that the result, as stated by Mr. Frye, should have been satisfactory to all parties. The great controlling fact, so far as the present case is concerned, is that no objection was made by any of the parties to the controversy, to a limitation of the carrier's liability for latent defects, provided the owner shall exercise due diligence to make the vessel seaworthy.

III.—The libellant's counsel argues in the second point of his brief that the exemption from latent defects as claimed in this case is contrary to the terms of the second section of the Act, and indulges in some grammatical gymnastics to prove that "due diligence" in that section relates only to the clause "to properly equip, man, pro-

vision and outfit said vessel." The wisdom of the Senate, however, is commended in adding this limitation of due diligence to this so-called "first obligation to properly equip, man, provision and outfit." But it is alleged that the Senate carefully left the duty of seaworthiness unqualified in accordance with the existing law.

Any defect in equipping, manning, provisioning or outfitting a vessel is quite as likely to result in damage to cargo as a latent defect, and the lack of a sufficient number of men or of a sufficiently large quantity of provisions would be much more likely to result in the entire loss of the ship than would some trifling defect in the hull. It is hard to see, therefore, why the same wisdom which applied the qualification of "due diligence" to such duties on the part of the shipowner, should not also extend the qualification to the obligation of seaworthiness. Indeed, so far as the reason for the qualification of "due diligence" goes, if it were to be applied to but *one* class of duties, Congress would naturally select that class which was most difficult of absolute performance, and that is certainly the duty of "seaworthiness." An owner can always know that his ship is properly provisioned and sufficiently manned, and such knowledge is much easier to obtain than it is to find a latent defect. In the former case you know what you are looking for, in the latter you do not.

The very rigor of the requirements placed upon the shipowner, as pointed out by the libellant's counsel, only strengthens the contention that the Harter Act was intended to change them, and it is difficult to see how this intention could have been more plainly expressed in the second section, without making absurd English of it.

IV.—Libellant's advocate has expended all of his force upon the second section of the Act, and seems to have

overlooked the third section entirely. Whatever argument may be indulged in as to the second section it is impossible to make even a plausible argument on the third, and it is under that section that the *Carib Prince* is entitled to exemption. There the requirement of exercising "due diligence" is first applied to making the vessel in all respects seaworthy. It reads:

"Section 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America *shall exercise due diligence to make the said vessel in all respects seaworthy*, and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterer, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel," &c.

A fair consideration of that section alone shows conclusively how the preceding section must be construed, and disposes of the entire argument of the plaintiff. The whole Act should be construed together. No reason can be assigned for a construction of the second section which shall make the warranty of seaworthiness absolute, while under the third only due diligence to make her seaworthy is required.

V.—An old petition of the Glasgow Corn Trade Association is quoted to support the proposition that the exemption of the carrier from liability for a *latent* defect in hull would be an intolerable evil. But this petition makes no such complaint. It complains of a clause exempting the carrier from liability for *all* defects in hull. This would be unreasonable, and is prohibited by the Harter Act. But when the shippers, through their Produce Exchange, formulated a bill of lading, they agreed

to the exemption from liability for "any *latent* defect in hull or machinery."

Wheeler on Modern Law Carriers, p. 350.

And the Harter Act cannot be supposed to have gone farther in its prohibition than the shippers th mselves had thus requested.

Second.

Evils remedied by Harter Act.

I.—One cardinal rule for the construction of statutes is to consider the state of the law before the adoption of the statute, and the evils which the statute sought to remedy.

1. It has for many years been well settled that the rule applicable to the construction of the contract of insurance in case of loss, differs from that which would be applied in the case of an action on a bill of lading.

This distinction in effect was this: That in an action on a policy of insurance, the underwriter would be liable for a loss, the immediate occasion of which was a peril of the sea, although its efficient cause was the negligence of the master and mariners.

2 Arnould on Insurance, 655.
Orient Ins. Co. *vs.* Adams, 123 U. S., 67.
Waters *vs.* Merchants' L. Ins. Co., 11 Peters, 213.
Busk *vs.* Royal Ex. Ass. Co. 2 B. & Ald., 73.

Indeed, it was held by the Supreme Judicial Court of Massachusetts, that an insurance against sea perils would cover a loss occasioned by the barratry of the master, though this was not specified.

Parkhurst *vs.* Gloucester Ins. Co., 100 Mass., 301.

On the other hand, in actions on bills of lading, it was equally well settled that if the efficient cause was the negligence of the master or mariners, the carrier would be responsible, although the immediate cause was a sea peril. The rigor of this latter rule has been somewhat modified in this Court. It has held that the carrier was not liable if the immediate cause of the loss was a peril excepted in the bill of lading, although delay on the carrier's part brought the goods into a place where and at a time when the peril occurred.

Railroad Co. *vs.* Reeves, 10 Wall., 176.

This decision was followed in

The *R. D. Bibber*, 2 C. C. A., 50; 50 Fed. Rep., 841.

In accord with these decisions are

Denney *vs.* N. Y. Central R. R. Co., 13 Gray, 41.

Hoadly *vs.* Northern Transp. Co., 115 Mass., 304.

Michigan Central R. R. *vs.* Burrows, 33 Mich., 6.

But, nevertheless, there were numerous cases, pointed out in these decisions, in which it was held that a carrier might be liable to the shipper for a loss of goods occasioned by the negligence of the mariners, when he himself

could recover upon a policy of insurance upon the vessel, caused by the same negligence.

On the other hand, there were cases of latent defects where the underwriter, having paid a loss upon cargo, was subrogated to the right of the owner of the cargo to recover against the carrier, although neither the latter nor his servants had been negligent in any particular.

2. The question in suits on bills of lading for damage to cargo, is really one of insurance. At common law the carrier was an insurer against all losses except those arising from the act of God or the public enemy. The development of the business of Insurance Companies has greatly increased the security of shipowners. Their policies not only cover losses arising from those perils for which the carrier was not liable at common law, but also many others for which the carrier was liable. This not only gives the shipper a complete remedy, but affords protection against insolvency of the carrier, or his taking proceedings to limit his liability by the surrender of his interest in the ship and her freight then pending. This development produces a condition, not only of greater security, but of greater justice than the common law of carriers produced.

3. There were many instances of great hardship at common law. The carrier often suffered enormous loss, sufficient sometimes to produce insolvency, without any actual fault on his part. No better illustration of this could be furnished than the present case. It is undisputed and indisputable, that in the construction and equipment of the *Carib Prince* no expense or pains were spared. Competent ship builders were employed, and thorough inspection given. The ship was chartered and the charterer engaged the officers and crew. If there was any defect of inspection subsequent to the ship's sailing from England, it was the fault of servants who were never employed by the shipowner. Yet here it is sought to make the owner and the ship responsible for such neglect.

On the other hand there are many cases of gross negligence from which no injurious consequences follow. The effect of the rigorous enforcement of the common law liability of the carrier and of the strict construction of statutes passed for his relief, is therefore subject to two criticisms: It punishes the innocent, and it does not punish the guilty.

Undoubtedly the original tendency of the decisions is shown in some of the quotations on the appellant's brief. A severe responsibility was imposed upon the carrier. The Courts carried to the farthest extent the rigorous warranty of seaworthiness which they implied. As carrying trade has increased and the nations have realized its importance and the greatness of the public benefit which it produces, their policy has been gradually assuming a different form. For years this has been in the direction of more careful inspection and more rigid requirements as to the manning, construction and equipment of vessels. In this way seaworthiness is secured in advance, which is certainly more for the public interest than the imposition of a punishment for the failure to secure it. It is therefore equitable and just and in accordance with public policy that the Legislature, while imposing rigorous requirements upon builders and owners of ships, should provide that if they exercise due diligence to make a vessel seaworthy (which implies by necessary inference a strict compliance with the requirements of statutes as to the manning, construction and equipment of the vessels) they should be relieved from the rigor of the common law warranty of seaworthiness.

In view of the hardship often resulting from the application of the warranty of seaworthiness, the Harter Act introduced a much needed reform. It cannot seriously be contested that its provisions are not as binding upon the underwriter as they are upon the shipper and

the shipowner. In view of the provisions of Section 2, if the Court should construe them in accordance with the arguments before mentioned, which are simply a statement of their plain language, an underwriter certainly could not set up as a defense to an action against him upon policies of insurance upon the cargo, that there was a latent defect in the ship when she broke ground for the voyage, for which the owner would not be liable under this act.

On this same principle, that an Act like the one under consideration is effective to modify all relations to which, by reasonable implication it applies, it is held that in salvage cases the value of the cargo on the salving ship need no longer be considered, because the Harter Act allows deviation for salvage.

The Alaska, 75 Fed. Rep., 430 (Benedict, J.).
The Florence, 65 *Ibid.* 248 (Brown, J.).

II.—Libellant argues that, regardless of the Harter Act, a vessel must be absolutely seaworthy at the time of sailing, quoting from *The Caledonia*, 157 U. S., 124, at page 137:

"As is well said by counsel for appellee, the exceptions in a contract of carriage limit the liability, but not the duty of the owner, and do not *in the absence of express provision* protect the shipowner against the consequences of furnishing an unseaworthy vessel."

The fact should not be overlooked that the Harter Act was passed after the decision of the *Caledonia*, and its wording was unquestionably influenced by that decision. By that Act the "express provision" which was absent in the *Caledonia*, was intentionally supplied in Section 3, where it is provided "that if the owner of any vessel * * * * shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned,

equipped and supplied, neither the vessel, her owners, etc., shall become or be held responsible. * * *"

The most important question which the Court has to decide in this case is whether or not the Harter Act has mitigated the severity of the requirement imposed by the *Caledonia*, and that case cannot be cited in this connection to prove that the *Carib Prince* is liable, without begging the question.

Third.

Policy of Insurance and Bill of Lading.

In practice the policy of insurance goes with the bill of lading; and the draft drawn against the proceeds of the goods, on which the banker makes his advances, is secured by both. Sometimes the insurance is expressed to be "with all liberties as per bill of lading," or other equivalent words. But in practice the underwriter, as between himself and the assured, treats the policy as if it were so expressed, and pays the loss and sues the carrier, if he thinks there is any claim maintainable against him. This is what was done in

> The Phenix Ins. Co. *vs.* Liverpool & G. W. S. S. Co.; *The Montana.*
> 22 Fed. Rep., 715, 129 U.S., 397.

Frequently the suit is brought in the name of the shipper, but the underwriter is the real party in interest.

It is certain that as soon as the construction of the Harter Act is settled the customs of commerce will conform thereto. The insurance companies make it their business to insure against risks. This is what they are paid for. Out of this they make their money. If this

Court hold that the true construction of the Harter Act is to limit the absolute warranty of seaworthiness implied at common law, so that it becomes a warranty of due diligence, the risk arising from latent defects, not discoverable by due diligence, will be borne by the underwriters. Such their practice has already become, and such it will continue.

Fourth.

Public Policy.

I.—The quotation is often made from the *Reeside*, 2 Sumner, 567, 575, that "every relaxation of the common law in relation to the duties and responsibilities of the owners of cargo ships, is founded in bad policy, and detrimental to the general interests of commerce."

This statement of Mr. Justice Story, like most universal statements in regard to public policy, is to be taken with many deductions and limitations. It is impossible to say that the policy of one generation must necessarily be the policy of another. Enough has been already said to show that this Court in dealing with cases relating to carriers, as well as other cases, will recognize the force of the ancient maxim: "*Cessante ratione, cessat et ipsa lex.*" This was well expressed by Lord TENTERDEN in

Stone *vs.* March, 6 Barn. & Cress., 551:

"The rule is founded on a principle of public policy, and where the public policy ceases to operate, the rule shall cease also."

In Nichols *vs.* Eaton, 91 U. S., 716, 726,

this Court held that the policy of the English law as to

the right to set apart property for the use of another, free from the claims of his creditors, had been changed by the general tenor of the statutes of various States of the Union, limiting the common law rights of creditors, and would no longer be enforced by American Courts of equity.

So the Court of Appeals of New York in

DeWitt *vs.* Barley, 9 N. Y., 371,

held that the change in legislation in regard to evidence had changed the rule excluding evidence of the opinions of witnesses.

In the case of common carriers, legislation has made great changes. The Act of Congress of March 3, 1851, 9 U. S. Statutes at Large, 635, adopted the rules of the Law Merchant in reference to the limitation of liability of shipowners, to the amount of their interest in the vessel and her freight then pending.

In

The Scotland, 105 U. S., 24,

this Court held that the efficacy of this rule in the United States "depends upon the statute and not upon any inherent force of the maritime law." But it gave a liberal construction to the statute and held that it applied to foreign as well as to domestic vessels. This act has been re-enacted by the Rev. Stat. Section 4282 to 4289.

The language of this Court in Providence & N. Y. S. S. Co. *vs.* Hill Mfg. Co., 109 U. S., 578, 588, in reference to the limited liability act, is especially applicable to the case at bar:

"In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the

courts having the execution of it administer it in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment."

Of the same statute the New York Court of Appeals said in Chamberlain *vs.* Western Transportation Co., 44 N. Y., 305, 309:

"This is not in any sense a penal statute, nor is it in any way derogatory to natural right, and hence I know of no rule of law that requires that it should be strictly construed. It is true that it changes the common law, but there can be no reason for applying the rule of strict construction to the vast body of statute laws which change the common law. The prior law, whether it be statute or common law, is to prevail, unless the subsequent statute, by a fair and proper construction, repeals or modifies it. This statute is rather a remedial statute. It was enacted to remedy the rigor of the common law, which it was deemed unwise, on grounds of public policy, to continue. It should, therefore, be construed, if not liberally, at least fairly, to carry out the policy which it was enacted to promote."

In pursuance of this liberal policy, this Court has held that the claimants against the shipowner are not entitled to have the amount of any insurance on the vessel or freight, included in the stipulation for value.

The City of Norwich, 118 U. S., 468, 493.
The Scotland, 118 U. S., 507.

II.—In all the cases which have been decided in the Circuit Courts of Appeals and in the District Courts, the

Harter Act has been treated as an act passed in pursuance of wise policy, and to be liberally construed.

The Silvia, 64 Fed. Rep., 607; affd., 15 C. C. A., 362, 364; 68 Fed. Rep., 230.
The Viola, 60 Fed. Rep., 296, 298.
The E. A. Shores, Jr., 73 Fed. Rep., 342.
The Etona, 64 Fed. Rep.,880; Aff'd. 71. *Ibid.* 895; S. C, 38 U. S. App. 150, 18; C. C. A., 380.

This Court is now to decide whether it will enforce the statute of the Congress of the United States as adopted, in the spirit in which it was passed, according to the natural construction of its language, or whether it will by a strained and unnatural construction, limit the benefits which that Act was intended to secure to American commerce. Great Britain and the nations on the Continent of Europe allow the insertion in bills of lading of clauses similar in effect to that now contended for. The final debate on the Harter Act in the House shows that the Act was passed in view of this fact, and to give to American commerce the same freedom of contract enjoyed in other countries.

24 Cong. Record, Part 2, pp. 1291, 1292.

III.—The question of policy was certainly one that Congress could determine, and has, we think, determined. But if this question were now to be determined by this Court, should it not hold that prevention is better than punishment? The common law undertook to prevent carelessness in the equipment of vessels by the owner, by a pecuniary mulct whenever injury was caused by such carelessness. Modern legislation undertakes to prevent negligence by rigorous requirements as to the construction of vessels, by careful inspection of them from time to time by official inspectors, and by a rigid examination of the officers and engineers of sea-going vessels. The rigor of these requirements has been progressively in-

creased both in England and this country. The carrying trade of England is far in excess of that of all other countries in the world, and Parliament has not been backward in recognizing this fact and in exacting from shipowners and shipbuilders, full peformance of the duty which this great commerce imposes.

An abstract of some of the American and English statutes on this subject is appended to this brief.

IV.—It is argued that the bill of lading "is the measure of the responsibility, but not of the duty," of the carrier. The duty is fulfilled when all reasonable diligence is used. It is a matter of public interest, and is enforced specifically by legislation.

The result of the legislation on this subject, enforced as it has been by the enterprise and public spirit of the great shipbuilders and shipowners, has been to produce a remarkable decrease in the loss of life and of property at sea and to give to travelers by sea a far greater security than the former policy of the law produced. Every ocean traveler, whose experience covers twenty years knows something of the improvements in steamers. The analysis of official reports, which is given in the appendix to this brief, shows the satisfactory and remarkable results.

Thus it has turned out that the experience of a whole generation is wiser than Mr. Justice Story, and that the method which he thought best has proved to be inadequate, while another, which he never thought of, has been developed and applied. It might as well be said that no method of propulsion or construction of vessels would ever be discovered that should be better than the clippers of Judge Story's time, as to say that public policy in reference to common carriers could never be wisely changed. He knew nothing of collision bulkheads, of twin screws, of

iron and steel ships, or of the statutes for the inspection and examination of ships before and after they are completed.

Indeed when that learned lawyer and great Judge died, the propulsion of vessels by steam was in its infancy, and seagoing vessels were usually owned by individuals, and commonly commanded by one of the owners. The enormous development of the carrying trade in the last fifty years has led to different legislation and a different policy. It was well enough for him to enforce caution in the only manner which lay within his power, but a better method has now been devised. There would certainly seem to be little justice in refusing at the present day, to allow a shipowner to exempt himself from defects which can not be brought to light by the system of Government examiners, and by the many precautions which he is forced by law to take. It would certainly be poor public policy to make the carrying trade so hazardous as to drive people out of it, or discourage the investment of capital in it.

Fifth.

What are Latent Defects.

I.—The libellant claims that latent defects can mean only such as could not have been originally discovered, even by the shipbuilder, and that "defects must exist which no skill can detect, and the effects of which no foresight can avert." If this argument is logically carried out, it must mean that even if a ship has changed hands a dozen times the last owner is responsible for defects which might possibly have been discovered at the time of construction, but which he can only discover by tearing the ship to

pieces. If such is the law there is no safety for the purchasers of ships, no matter how careful they may be. They could never know whether they were laying a basis for future profits or future liabilities. The old maxim of "*caveat emptor*" would become applicable in a very new sense. Moreover, there is no such thing as a defect which "*no* skill can detect and the effects of which *no* foresight can avert." An owner can always hire an expert to tear his ship to pieces. The *Caledonia's* shaft might have been subjected to such a test strain that the flaw would have been exposed.

To prove the validity of the above definition of latent defects cases are cited, in which it is claimed that this is the well-settled definition. But they do not support the proposition.

Indeed, the libellant's advocate throughout his entire brief has sought to prove his contention by the use of the briefest possible quotations, many of them from insurance cases, in which of necessity the rulings would be different from cases of the present nature. His position is proved by these citations in the same way that any proposition, good or bad, could be upheld by the best authority in the world, if isolated sentences were to be taken without regard to the facts of the case in which they were stated, or the context in which they appear.

II.—When the locomotive was invented and the liability of the carrier of passengers by land became the subject of consideration, Courts were much impressed by the danger to which this new method of propulsion exposed the lives and limbs of passengers. They did not apply the rule which had for centuries made the carrier of goods an insurer against all damage except that caused by the act of God or the public enemy. But they did establish what was avowedly a very rigorous rule; to wit, that the car-

rier of passengers was liable for all injuries against which the highest degree of human skill and foresight could have guarded. This rule was not based upon any definition of the phrase "latent defects." It did not deal with the question as to freedom of contract. It was the law governing the carrier's liability in the absence of a special contract. It was based upon the necessity of protecting life and limb. Hence these decisions do not touch the point. We are dealing with a contract of exemption from injury caused by latent defects. We have already shown that the Harter Act does not make this illegal. And we must now consider what it means.

In the Century Dictionary the phrase under consideration is thus defined:

"LATENT.—Hidden, concealed, not visible or apparent, not manifested."

It quotes among others the following:

"To evoke the *latent* genius of the nation, and to direct it to the spheres in which it is most fitted to excel, is one of the highest ends of enlightened statesmanship."—Lecky, England in Eighteenth Century, 111.

"LATENT FAULT, in *law* a blemish or defect in goods purchased which was concealed from or not observable by the buyer before acceptance of the goods."

In none of these definitions and illustrative quotations is the suggestion made that "latent" means that which cannot be discovered by any amount of investigation. Literally the word means hidden. It is implied in the ordinary use of the term, that what is hidden may be discovered. In the quotation from Lecky, this is done by the genius of the statesman. In all the quotations there is the suggestion of a possible discovery. In short, latent means that which is concealed, but may possibly be discovered; although ordinary observation would fail to bring it to light.

III.—The act prohibits a clause lessening the obligation to use due diligence. The proof shows this was used. In short, to sustain the exemption so far as the Bill of Lading is concerned we need only to show that the defect was concealed. To sustain it under the Act of Congress, we must prove that it was not discoverable by due diligence.

The latter is proved by the original and most thorough inspection in London in the spring of 1893, and by a less thorough, but equally careful examination by the Chief Engineer Keeys, in August, 1893, after the hurricane (pp. 44, 45, fols. 130–133). He says the defect was not "discoverable by inspection" (p. 45, fol. 133).

IV.—The argument is presented that "latent" means that which had no existence at the beginning of the voyage, but was caused afterwards by a sea peril, like the straining of a mast, by a storm, invisible externally. To this we reply:

(*a.*) No exemption by contract is needed for injury from such a source. It would be a loss caused by a sea peril, for which the carrier would not in any case be liable.

(*b.*) This construction does not deal with the contract as made. It makes one. It adds qualifying words not in the contract at all. The words used are "Accidents to or latent defects in hull." A defect is just as latent at the beginning of the voyage as when it is caused by a subsequent injury. Latency is one thing, time when it is caused is another and quite a different thing. A Court has power to declare a contract invalid. It has no power to make a contract for the parties. Yet that is what libellant must do to succeed in this contention.

(*c.*) The implied warranty of seaworthiness extends to the time when the vessel actually breaks ground for the

voyage, and not merely to the time when she begins to take in cargo. The libellant's quotation from

The Eugene Vesta, 28 F. R., 762,

states this proposition. Mr. Justice BROWN there said:

"The theory of the law is that the implied warranty of seaworthiness shall protect the owner of the cargo until his policy of insurance commences to run."

To the same effect is

Bowring *vs.* Thebaud, 56 F. R., 520.

The exception of liability for latent defects relieves the shipowner from the implied absolute warranty of seaworthiness, and if the implied warranty, without the exception, would attach immediately on placing the goods on board, a reasonable construction of the exception can only be that it, too, was meant to become operative at the same time. No owner realizing that his liability upon an implied warranty of seaworthiness began when the first bale of goods was placed upon his ship, would make a contract whereby his exemption from that liability was only to begin several days later.

V.—The bill of lading is attacked as an "incoherent and illogical document," "careless and slovenly"; and, therefore, presumptively, to be disregarded. But, whatever justice there may once have been in this criticism upon old forms of bills of lading, it can have no application to the form in this case which is the result, as has been shown, of most careful consideration on both sides. The shippers have formed corporations, and have the power that comes from united action. They have appealed both to Courts and Legislatures, and obtained bills of lading satisfactory to themselves, carefully drawn, and explicit in language.

Sixth.

Seaworthiness of the Carib Prince.

The argument thus far has proceeded on the assumption that the *Carib Prince* at common law would have been held to be not seaworthy. It is desirable certainly that this Court should express in this case its opinion upon the question arising on that assumption. But we do not at all admit that the *Carib Prince* was not seaworthy.

I.—Seaworthiness is defined by this Court to be "fitness to perform the voyage which her owners had undertaken that she should perform safely, with the exception of the unavoidable dangers of the river and of fire."

The Northern Belle, 9 Wall. 526, 529.

In the *Caledonia*, 157 U. S., 124, the Court quote with approval (p. 131) the statement by Parsons, 1 Marine Ins., 367:

"Every person who proposes to any insurer to insure his ship against sea perils, during a certain voyage, impliedly warrants that his ship is in every respect, in a suitable condition to proceed and continue on that voyage, and to encounter all common perils and dangers with safety."

Under these definitions the *Carib Prince* was seaworthy. Even assuming that the rivet was broken when she sailed from Trinidad, she was undoubtedly sound for the voyage. The defect, if it existed then in the rivet, was not a defect that interfered in any way with her being tight, sound and staunch for the voyage.

To amount to unseaworthiness a defect must be such that the vessel is really not worthy, in the judgment of a reasonable man, to go to sea. Every little defect does not make a vessel unseaworthy, even though it may result in

damage to the cargo. For instance, suppose that the fresh water tank of the *Carib Prince* instead of the ballast tank had been defective, a leak in it might well have injured some of the cargo, just as the leak in a small tank in a passenger's stateroom might injure his baggage. But neither of these leaks, nor the actual one in the ballast tank of the *Carib Prince* would have rendered the ship unfit for navigation. The most that could have happened was that the tank should have been emptied, and its entire contents run through hold No. 1. It would then have worked its way into the bilges, and been removed by the pumps, without at any time or in any way endangering the existence of the ship, or rendering her difficult to manage. In other words, no defect can be said to render a vessel unseaworthy unless the maximum amount of damage which can be caused by that defect would render the vessel unseaworthy. Defective plating, an insufficient crew or an incorrect compass render a vessel unseaworthy, only because with such defects she cannot be safely navigated.

The decision of the German Imperial Court of Appeal in Civil Cases in the *Princess*, of which a copy is annexed, supports the proposition just stated.

The injury to the cargo was caused by the act of the Master in pumping water into the fore peak. This act of his was not necessary in any respect for the safety of the ship. It was simply availing himself of a convenience that had been provided in the vessel. The proposition may be tested by the question, Would the vessel have been seaworthy if she had not been provided with a ballast tank in the fore peak? Obviously, she would. It no doubt might be sometimes convenient, and tend, as the captain testified, to produce a better speed, to trim the ship by the addition of water to this ballast tank. But it cannot be said that a failure on

the part of the captain to fill this tank before the ship sailed made her in any respect unseaworthy. The case is really analogous to the porthole cases which have been decided in England and this country, and in which the Courts of both countries have agreed. It has been held that if a vessel sails with an open porthole she is not therby rendered unseaworthy, provided that the state of the weather at the time she sails is such as to make the opening of the porthole convenient and proper. The duty of the master would be to cause the porthole to be closed if bad weather should ensue. But the fact that the porthole was open at the time of sailing, when there was no bad weather, does not make her unseaworthy.

The Silvia, 15 C.C. A., 362, 68 Fed. Rep. 230.
Steele *vs.* Steamship Co., 3 App., Ca., 72.

So in Headley *vs.* Pinkney & Sons, S. S. Co., App., Ca. (1894) 222, the House of Lords held that a vessel which had on board when she sailed, appliances suitable to protect an opening in the bulwarks, was not rendered unseaworthy by the failure of the master to put them up.

II.—In the case at bar it is clear that the vessel was seaworthy when she broke ground upon her voyage. When such is the case it is equally well settled that the warranty of seaworthiness does not extend to her subsequently becoming unseaworthy, even though this be caused by the negligence of the Master. The rule is thus stated in

Arnould on Insurance, Vol. 2 pp. 640, 642:

"It is enough to satisfy this warranty if the ship be originally seaworthy for the voyage insured when she sails on it. There is no implied warranty that the ship shall continue seaworthy in the course of it. 'Every ship' says Lord MANSFIELD, 'must be seaworthy when she first sails on the voyage insured, but she need not continue so throughout the voyage.' * * * *

"It makes no difference whether the state of unseaworthiness be occasioned by the negligence of the master and crew or of other parties employed by the assured upon the business of the ship in the usual course of trade."

III.—Libellant's counsel has disregarded the testimony that the bolt may have been crystalized by hammering, which would make the defect a latent one even within his own construction, and argues at great length from the testimony which it is alleged proves that the broken bolt was improperly put in place. That testimony, however, and the lurid quotation in the appendix, are of absolutely no force when construed in connection with other facts in the case.

Had the break in the bolt been caused by the fact that the bolt holes in the plates of the bulkhead did not coincide, the break would have been at the centre of the bolt, and not at the end. When the red hot bolt was welded, any weakness in it must have been developed on the plane where the plates touched, as that would have been the point of the smallest area, and when any strain was brought to bear against the plates, if this lack of coincidences in the holes was increased, the result would have been that in changing their position, even slightly, the two plates would have acted like blades of shears, and cut the bolt off clean, as frequently happens when a vessel goes on the rocks. In this injury, however, the welded head of the bolt was snapped off at the end and the bolt was not cut in two at the centre. That fact indicates most clearly that when the tank was being filled, the momentum of the water thrown against the bulkhead by the pitching of the ship sprung the entire bulkhead inward towards hold No. 1. Such a bend in the plane of the plates would of necessity tend to draw the bolts to a greater length, and break off the welded heads when the limit of elasticity was reached. In this connection it is a very significant fact that the

bolt broken in this case was the one in the row farthest from the side of the ship, where the springing of the plates would have been through the greatest distance, and the consequent pressure brought upon this bolt more severe than that upon any of the others nearer the side of the ship. It is only in this way that such a fracture of this bolt could have been made. In view of Congdon's evidence that he has seen an entire bulkhead knocked flat upon the ship's bottom when a tank was filled at sea, this broken bolt becomes the most natural result (p. 133, fol. 398).

But even granting all of the facts urged by the libellant that the bolt was defective, and that the bolt holes in which it was placed were imperfect, the testimony remains unquestioned that this bolt was, in spite of those facts, stronger than was required by *Lloyds' Register*, and capable of standing a greater strain than any master had a right to put upon it. The libellant's own contention, and that of W. Clark Russell, is to the effect that the strength of the bolt was lessened when it was driven in. Nevertheless it was still strong enough to stand the water test which was applied, in which the pressure was greater than it could ever be with the tank absolutely full. There is no force whatever in the argument that it should have been still stronger, because the required strength had been already surpassed.

IV.—If the Court is to hold that the *Carib Prince* was unseaworthy when she sailed, on the ground that this bolt was in a damaged condition at that time, the result of such a decision should be clearly understood. For instance, in the case of this voyage, suppose that when the *Carib Prince* was one day out, she had caught fire, and the entire cargo had been destroyed. According to the libellant's contention, the insurance policies upon the entire cargo

could have been cancelled, upon the ground that the warranty of seaworthiness was broken at the time of issuing the policies. There is no such thing as unseaworthiness as to one hold of a ship and seaworthiness as to the rest of her. It must seem absurd to the Court that the contagion—so to speak—of this one bulkhead, could spread in such deadly fashion to the entire cargo, most of which could never have been affected by it under any circumstances, and none of which could have been injured but for the mismanagement of the captain in filling his tank at sea.

V.—The libellant's argument that to prove the safety of the tank it should have been filled before the vessel started upon her voyage shows only that the Master was certainly negligent in filling the tank at sea, when such a test had not been made. If the tank had not been filled a defective bolt in the bulkhead could not have caused injury to the cargo. His act, therefore, in so filling the tank, was the proximate cause of the injury. And the Harter Act excuses the vessel from liability for negligence in the captain's management. It is still good law that *causa proxima, non remota spectatur.*

Seventh.

The decree of the Circuit Court of Appeals should be affirmed with costs.

EVERETT P. WHEELER,
Advocate, with the Appellee.
Of Counsel for Atlas Steamship Co.

Appendix.

STATUTES OF THE UNITED STATES IN REFERENCE TO THE PROTECTION OF PASSENGERS AND FREIGHT ON SHIPS.

Revised Statutes of the United States.

(*Edition of 1875.*)

Titles 48, 49, 50, 52.

Sections 4252–4277 concerning *the Transportation of Passengers and Merchandise* were repealed by the Act of 1882, *22 Statutes at Large 186* (repealing clause on p. 191).

These sections are re-enactments of statutes passed at various times between 1855 and 1866; and contain numerous requirements for ensuring the safety of life and property at sea, which are not here stated at length, because such requirements are more amply enacted in 1882.

The following is an abstract of the latter Act:

An Act to regulate the carriage of passengers by sea.

Sec. 1.—(1.) Masters of steamship or other vessel, taking emigrant passengers or other than cabin passengers from foreign country (ports and places of foreign country, contiguous to United States excepted), are not allowed to bring such vessel or passengers to any place in United States unless below specified room space, accommodations, &c., be furnished the passengers for the entire voyage.

2. Space required.

(*a*) in *steamship*—100 unobstructed cubic feet per passenger—on main or first deck below main—and 120 unobstructed cubic feet per passenger on second deck below main—not lawful to carry passengers on any other decks.

(*b*) in *sailing vessels*—110 unobstructed cubic feet per passenger—to be carried only in deck below main deck or in a poop or deckhouse constructed on the main deck.

(*c*) Between decks or compartments, &c.—in which passengers are carried must not be less than *6 feet* high.

(*d*) Children under one year not counted as passengers—two children between one and eight counted as one passenger.

3. Penalty for violation.

Sec. II.—(1.) Every vessel shall have sufficient number of berths for the proper accommodation of all passengers.

(2.) On each deck and compartment not more than 2 tiers of berths; each berth 2 feet wide and 6 feet long (and other details providing for comfort).

(3.) Provisions for separate *male* and *female* compartments, family compartments, berths numbered, berths to be inspected, &c. Penalty for violation.

Sec. III.—(1.) Adequate provision for light, air, ventilation—form and number of ventilators, hatchways, companion ways, caboose, cooking-range and other cooking apparatus; sufficient water-closets. Penalty for violation.

Sec. IV.—Wholesome food, with reasonable quantity of fresh provisions (= to 1½ U.S. Navy rations) with not less than 4 quarts of water, 3 meals per day. Penalty for furnishing short allowance (except in case of accident). Penalty against master for violation; this does not affect civil responsibility of master and owners to passengers.

Sec. V.—Properly built and secured hospital compartments (1 male and 1 female) required, to be located in upper part of ship. Vessel bringing passengers other than cabin passengers—over 50—must have duly-qualified surgeon, with medicines, appliances, &c., to treat any passenger or children of passengers. Penalty for violation.

Sec. VI.—

(1.) Master authorized to maintain good discipline, and such habits of cleanliness as conduce to health, and in consequence shall cause his regulations to be posted up, and so to remain in accessible places in the vessel.

(2.) Compartments of passengers to be cleaned and disinfected.

(3.) Passengers and bedding to have clear and sufficient space on main deck set apart for their airing and exercise. Penalty for violation.

Sec. VII.—

(1.) Officers, seamen, &c., prohibited from visiting passengers' compartments without permission of master. If they do, they are punishable.

(2.) Master who permits them, except for performing a necessary duty in their official capacity, punishable.

(3.) Notice to this effect must be posted. Penalty for violation.

Sec. VIII.—Explosives, vitriol and other articles likely to endanger the lives or safety of passengers, vessel, animals, &c., not allowed to be carried except in vessels of iron in compartments divided off by water-tight bulkheads extending to upper deck. Penalty, &c.

Sec. XI.—Collector of customs of collection district or surveyor of port may direct inspection of vessel, passenger list, compartments, &c. : to be forwarded to Secretary of Treasury where and how he shall direct.

Sec. XIII.—The fines and penalties imposed upon master for violation of above provisions are liens upon vessel, and vessel may be libeled in U. S. Court.

Revised Statutes, § 4278-4280.—Prohibition and regulation of nitro-glycerine carriage. Not allowed on board passenger vessels.

TITLE LII.

Regulation of Steam Vessels.

Sections 4402-4403. Qualifications, appointment and duties of Supervising Inspector-General *i. e.*, preside at meetings, superintend administration of steamboat inspection laws, receive all reports of inspectors, examine accounts and report fully at stated periods to Secretary of Treasury upon all matters pertaining to his office, and secure correct and uniform administration of inspection laws, rules and regulations.

4404. Qualifications and appointment of Supervising Inspectors. They shall be experts in steamboat affairs.

4405. Meetings of board, assignment of districts.

4406. Supervising Inspector shall watch over all parts of territory assigned to him, shall deal with action of local boards of inspectors within his district, and shall instruct them in their duties, and shall visit (when he thinks expedient) vessels licensed, and examine their con-

dition to find out whether provisions of this title have been observed and complied with by (1) Board of Inspectors; (2) by master and owners.

4407. Whenever Supervising Inspector finds that provision has been violated, he shall report (1) to local board, or (2) cause negligent party to be prosecuted, or (3) report to Secretary of Treasury if he thinks official has been negligent.

4408. Supervising Inspector to see that local board executes its duties, and (Sec. 4409) supervise and inspect in districts where no local board exists.

4417. "The local inspectors shall, once in every year, at least, upon application in writing of the master or owner, carefully inspect the *hull* of each steam vessel within their respective districts, and shall satisfy themselves that every such vessel so submitted to their inspection is of a structure suitable for the service in which she is to be employed, has *suitable accommodations for passengers* and the crew, and is in condition to warrant the belief that she may be used in navigation as a steamer with safety to life, and that all the requirements of the law in regard to fires, boats, pumps, hose, life preservers, floats, anchors, cables and other things are faithfully complied with; and if they deem it expedient, they may direct the vessel to be put in motion, and may adopt any other means to test her sufficiency and that of her equipment."

4418. Local inspectors shall inspect the boilers of all steam vessels (1) before the same shall be used, and (2) once at least in every year thereafter. They shall inspect all the details of the boilers, furnaces, appurtenances, etc., and shall satisfy themselves that such boilers, machinery and appurtenances may be safely employed in the service pro-

posed in the written application without peril to life. They shall inspect safety valves, gauge-cocks, steam-gauges, low-water-gauges, proper insertion of fusible metals, adequate provision for ample water supply, means for blowing-out provided. They shall subject the boilers to the proper hydrostatic tests. No boiler or pipe nor any of the connections therewith shall be approved which is made in whole or in part of bad material, or is unsafe in form or dangerous from defective workmanship, age, use, or other cause.

4419. Inspectors must take absolute control of steam registers, and may take absolute control of one of the safety valves.

4420. Amount of steam pressure allowed freight boats on Mississippi river.

4428–4437. (4429, amended, 22 St., 310; 4430, amended, 28 St., 28; 4434, amended, 28 St., 690.) Provide for construction of boilers, with plates stamped in accordance with the provision of this title, provide punishment for improper construction, require special kind of inspection of boiler plates, require certain stamps on the plates, punish counterfeiting of such stamps, states steam pressure allowable in proportion to the boiler plates, specify thickness of the boiler plates and space between the flues, provide for feed and connecting pipes, for safety valves, fusible plugs, etc., and punish for obstructing safety valves.

4438–4449. (4438, 4441, 4442, amended by 18 St., 30). Providing that alien who has declared his intention to become a citizen of the United States may be licensed as engineer or pilot; treats of the licensing of ship officers.

4438. Boards of local inspectors shall license and classify the masters, chief mates, engineers and pilots of all

steam vessels. Unlawful for person not so licensed to serve as such officer, and penalty of $100 for each offense.

4439. For license of master, inspector inquires as to applicant's character, examines him as well as proof he produces. He must be satisfactory in respect to capacity, experience, habits of life and character. Licensed for one year, liable to revocation on proof of incompetency of any nature.

4440. For license of chief mate, same methods, time of licensing and power of revocation as for master. Examination specially directed to his ability in lading cargo, handling and stowing freight, in navigation and managing steam vessels.

4441. For license of engineer, same as in 4439, 4440. Specially examined in knowledge of steam machinery, experience as engineer. License same time as for above officers. Engineer assigned to class for which he is fitted. If he be negligent or unskillful, inspectors may revoke and assign him to lower grade of engineer if he be fitted therefor.

4442. For license of pilot, regular procedure as for previous officers.

4448. All officers licensed as herein shall assist the inspectors in their examination of any vessel to which such officers belong, and shall point out and report defects. In default thereof license to be revoked.

4450. Local boards of inspectors shall investigate judicially, and with all the incidents of judicial procedure, acts of incompetency or misconduct of the officers.

4453. Local inspectors shall examine at proper times in addition to the annual examination, and serve notice for repairs, etc., when needed.

4462; Secretary of Treasury to make such regulations as may be necessary to secure the proper execution of this title.

Title LII, Chap. II.

Transportation of Passengers and Merchandise.

Section 4463. No steamer carrying passengers shall depart from any port unless she shall have in her service a full complement of licensed officers and full crew, sufficient at all times to manage the vessel.

4464. Inspectors shall state in certificate of inspection number of passengers of each class that steamer has accommodations for, and can carry with prudence and safety.

4470. Ships to be provided with pipes attached to boiler, woodwork to be covered with incombustible material, etc., to provide against fire.

4471. Fire pumps and hose to be provided.

4472. Articles *very easily* ignitible, *e. g.*, loose hay, loose cotton or hemp, nitro-glycerine, etc., not to be carried on passenger vessels. Articles ignitible, but not to so great a degree, must be stowed in incombustible chests, etc., away from heat or friction. Board of Supervising Inspectors may make other provisions to guard against fire.

4473. Penalty and seizure and sale as punishment for unlawfully carrying cotton or hemp.

4475. Dangerously explosive and combustible articles to be securely packed, distinctly marked and separated.

4476. Penalty and criminal punishment for packing and shipping such articles otherwise than as directed.

4477. Watchmen to be kept at night to guard against

fire, &c., and to give alarm in case of accident or disaster.

4478. Penalty and revocation of license for neglect to keep watchmen.

4479. Fire extinguishers may be required by supervising inspectors.

4480. Wire tiller ropes (or iron chains or rods), bell-pulls, tubes, &c., required.

4481. *River steamers*—Required to have boat with lines, &c., ready for use, and when required; also metallic life boats—also (4482) life-preservers for every person on the boat—also (4483) fire-buckets, axes, water-barrels, &c.

4484. Vessels carrying passengers on maindeck shall be provided with permanent stairways and other means to allow escape to upper deck—also gangways or passages through freight stowed on main deck.

4485. (Am. 27, Stat. 16). Captain or mate shall assign to all main-deck passengers the space on deck they may occupy during the voyage, and such space must be kept clear of freight. Freight shall not be placed so as to interfere with the engineer in his work. (4486.) Penalty for violating 4484 and 4485.

4487. River steamers to be anchored when navigation unsafe.

4488. Life boats, &c., on ocean, lake and sound steamers and (4489). Penalty for so neglecting (Amd. 27, Stat. 16). Ocean and Great Lake steamers must have not less than three water-tight cross bulkheads.

4491. Instruments, equipment, &c., for better security of life as provided by this Title must be first approved (1) by Board of Supervisors, and (2) Secretary of Treasury.

4492. Barge in tow *carrying passengers* subject to provisions of this Title.

4493. "Whenever damage is sustained by any passenger or his baggage from explosion, fire, collision or other cause, the master and the owner of such vessel, or either of them, and the vessel shall be liable to each and every person so injured to the full amount of damage if it happens through any neglect or failure to comply with the provisions of this Title or through known defects or imperfections of the steaming apparatus or of the hull; and any person sustaining loss or injury through the carelessness, negligence or wilful misconduct of any master, mate, engineer or pilot, or his neglect or refusal to obey the laws governing the navigation of such steamers, may sue such master, mate, engineer or pilot and recover damages for any such injury caused by any such master, mate, engineer or pilot.

4494–4500. Referring to publication and enforcement of this title by penalties, &c.

ABSTRACT OF ENGLISH STATUTES REFERRED TO AT PAGE 21 OF FOREGOING BRIEF.

The Merchant Shipping Act of 1854.

17 and 18 Victoria, Chapter 104.
Abbott on Shipping (13 Eng. Ed.) p. 911.

PART I.—Extends the jurisdiction of the Board of Trade. Section 6 is as follows (p. 913):

"The Board of Trade shall be the Department to undertake the general superintendence of matters relating to merchant ships and seamen, and shall be authorized to carry into execution the provisions of this act, and of all

other acts relating to merchant ships and seamen in force for the time being, other than such acts relating to revenue."

PART II.—Requires the registry of British ships, their measurement, ownership, etc.

PART III.—Provides regulations relating to masters and seamen. The number of seamen on each vessel must be reported. Examinations are required of masters and mates (Sect. 131); and a vessel cannot put to sea till their certificates are produced (Section 136). Methods of apprenticeship are provided (Section 141). Whenever a seaman is discharged the master must report his conduct, character and qualifications to the Board of Trade (Sec. 176).

PART IV.—Safety and Prevention of Accidents.

Life boats and buoys are required (Sect. 292). Compasses must be examined in accordance with regulations of the Board of Trade Fire hose must be provided (Sect. 301).

Shipwright and engineer surveyors are to be appointed by the Board of Trade to survey passenger ships (Sect. 305) and such survey shall be made in accordance with regulations and under the direction of the Board of Trade (Sect. 307). The owner half yearly (Sect. 311) must have every passenger steamer surveyed by such shipwright and engineer surveyors (Sect. 309). The declaration of the surveyor must contain a statement (1) that the hull is in good condition; (2) that the partitions, boats, life-buoys, lights, signals, compasses and the certificates of master and mates are such and in such condition as required by this act; (3) the time for which said hull and equipments will be sufficient; (5) the number of passengers which the ship should carry.

The declaration of the engineer surveyor shall state (1) That the machinery is proper for the service and in good condition. (2) The time for which it will be sufficient. (3) That the safety valve and fire hose are in proper condition. (5) How long the machinery will be in proper condition (Sect. 309). The Board will give a certificate embodying the return of a Surveyor (Sect. 312), which must be placed in a conspicuous part of the ship (Sect. 317). The ship must not proceed on her voyage without a certificate. A penalty is provided for carrying more passengers than allowed by the certificate (Sect. 319).

Accidents must be reported to the Board of Trade (Sect. 326).

The Passenger's Act. 1855.

18 and 19 Vict., 119,

Abbott on Shipping, 13 Eng. Ed., p. 1053.

Regulates the space allotted to passengers, with a penalty for carrying more.

Regulates the equipment of passenger ships, with a penalty for violating these requirements

A passenger ship must be manned with an efficient crew to the satisfaction of the emigration officer.

Cattle and certain articles forbidden as cargo and ballast. Stowage of cargo and ballast must be approved by emigration officer.

Merchant Shipping Act, Amendment Act. 1862.

25 and 25 Vict., C. 63.

Abbott on Shipping, 13th Eng. Edit., p. 1085.

Engineers are required to obtain certificates similar to those of masters and mates (Sect. 5).

Chain Cables and Anchors. 1874.

37 & 38 Vict., C. 51.

Abbott on Shipping, 13th Eng. Ed., p. 1139.
Chains and anchors to be tested before sale (Sec. 3).

Merchant Shipping Act, 1876.

39 & 40 Vict. C., 80.
Abbott on Shipping, 13th Eng. Ed., p. 1141.

"Sect. 4. Every person who sends or attempts to send or is party to sending or attempting to send a British ship to sea in such unseaworthy state that the life of any person is likely to be thereby endangered, shall be guilty of a misdemeanor, unless he proves that he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purposes of giving such proof, he may give evidence in the same manner as any other witness.

Every master of a British ship who knowingly takes the same to sea in such unseaworthy state, that the life of any person is likely to be thereby endangered, shall be guilty of a misdemeanor, unless he proves that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purposes of giving such proof, he may give evidence in the same manner as any other witness."

"Sect 5. In every contract of service express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship and the master and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when

the voyage commences, and to keep her in a seaworthy condition for the voyage during the same; provided that nothing in this section shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state, where, owing to special circumstances, the so sending thereof to sea is reasonable and justifiable."

When a ship is believed to be in a condition dangerous to human life, the Board of Trade may order it to be detained and surveyed. If unsafe she may be ordered permanently detained or until certain repairs are made. Order of detention must be served on the captain of the ship. If he thinks it unjust he may appeal to a Court of survey constituted by this Act (Sections 6 and 7).

Where a foreign ship in the United Kingdom is unsafe because of excessive or improper loading, the above provisions as to inspection and detention shall apply (Section 13).

Any vessel arriving in a port of the United Kingdom from any port out of the United Kingdom between the last day of October and the sixteenth day of April, if it carries timber or heavy wood goods on deck, or light wood to a greater height than three feet above deck, shall be liable to a penalty (Section 24). The deck lines of every vessel must be conspicuously marked (Section 25).

"Sec. 26. With respect to the marking of a load line on British ships the following provisions shall have effect:

1. The owner of every British ship (except ships under eighty tons register, employed solely in the coasting trade, ships employed solely in fishing, and pleasure yachts) shall, before entering his ship outwards from any port in the United Kingdom upon any voyage for which he is

required so to enter her, or, if that is not practicable, as soon thereafter as may be, mark upon each of her sides amidships, or as near thereto as is practicable, in white or yellow on a dark ground, or in black on a light ground, a circular disc twelve inches in diameter, with a horizontal line eighteen inches in length drawn through its centre.

2 a. The centre of this disc shall (be placed at such level below the deck line marked under the provisions of this Act, as may be so approved by the Board of Trade, and shall) indicate a maximum load line in salt water to which (it shall be lawful) to load the ship;

A report must be made to the Officer of Customs of the distance between the deck line and load line (Sec. 26)."

Merchant Seamen. 1880.

43 and 44 Vict. C. 16.

Abbott on Shipping, 13 Ed. p. 1163.

A seaman shall not be entitled to the rating of A. B. that is to say able-bodied seamen, unless he has served four years before the mast (Sec. 7).

Merchant Shipping (Carriage of Grain) Act 1880.

43 and 44 Vict. C. 43.

Abbott on Shipping, 13 Eng. Ed., p. 1168.

Sec. 3. All reasonable and necessary precautions must be taken in order to prevent the grain cargo from shifting. If such precautions have not been taken, the master and any agent of the owner charged with the loading shall each be liable to a penalty of not over three hundred pounds. The owner shall also be liable unless he shows that he took all reasonable means to enforce the observance of this section.

Sec. 4. Where a British ship is laden in the Mediter-

ranean or Black Sea, and bound out of Gibraltar, or where it is loaded on the coast of North America, there shall not be carried above the main deck any grain except what may be needed to feed the cargo in the hold, and carried in properly-constructed feeders. (2) In the majority of cases (exceptions specified) one quarter of the grain in the hold must be put in bags supported on suitable platforms laid upon the grain in bulk (Sec. 4). The master must deliver at the consular office, the vessel's draught, the kind of grain, method of stowage and precautions taken against shifting (Sec. 6). The Board of Trade may appoint an inspector who shall have the same power as an inspector under the Merchant Shipping Act of 1854, so as to be able to enforce the Act (Sec. 8).

Merchant Shipping (Life Saving Appliances) Act 1888.

51 & 52 Vict. C., 24.

Abbott on Shipping, 13 Eng. Ed., p. 1204.

The owner and master must provide the best of boats, life jackets and other appliances for saving life (Sect. 1).

The Board of Trade is to make rules in detail, arranging ships into classes and providing what appliances each class must have.

If these rules are not observed the Master, if in fault, shall be fined not over fifty pounds. If the owner is in fault he is to be fined not over one hundred pounds (Sec. 4). To enforce these rules a surveyor appointed by the Board of Trade may inspect the ship to see that it is properly provided with appliances. If defective appliances are found notice must be given to the master or owner and to the collector of customs. The latter shall not allow the vessel to clear without a certificate from the surveyor of the Board of Trade that the vessel has proper appliances.

Merchant Shipping Act 1890.

53 Vict. C., 9.

Abbott on Shipping, 13 Eng. Ed., p. 1226.

The centre of the load line disc shall indicate the maximum load line in salt water, to which it shall be lawful to load the ship (Sect. 1).

The Board of Trade may regulate details in regard to this matter. The Board of Trade shall appoint the committee of Lloyds Register to approve and certify the position of the load line disc. (Sect. 2).

The foregoing acts are codified in the Merchant Shipping Act 1894. L. R. Statutes, Vol. 31 (57 and 58 Vict.), 339; Chitty's English Statutes 1894, Tit. Shipping.

Appendix showing the diminution in the loss of life and property at sea in steam vessels, during the last six years.

In the twelve years ending 1895-96, the number of sailing vessels registered and employed in the United Kingdom steadily decreased from 9,849 in 1883-84, to 6,373 in 1895-96. During the same period the number of steam vessels steadily increased from 4,707 to 5,627. The total number decreased from 14,566 to 12,000. The size and tonnage of steamers have also increased.

This change from sail to steam enables a smaller number of vessels by making a larger number of trips, to do an increased business. As each vessel makes more voyages during the year, there is a much greater likelihood of injury and loss of life. In spite of this fact, the returns made to the British Board of Trade show that the death rate has decreased. These official returns cover twelve years, ending 1885-96. Exceptional losses by collision occasionally increase the rate in a given year. For example, in 1894-95, the Kow Shing with 1,150 Chinese soldiers on board sunk

as the result of a collision in the China seas. It is therefore just to take the average of several years. The following is a comparison of the results of these returns for the first six years, with those of the last six.

Per cent of lives lost (including Lascars and those not employed during the whole year) by wrecks or casualties compared with the number employed.

	(1) On Sailing Vessels.	(2) Steam.	(3) Total.
First six years...	.78 2/3%	.39 1/3%	.54 1/3%
Last six years...	1.06 5/6%	.28 1/3%	.50 2/3%

Per cent of lives lost by Wrecks, Casualties and Accidents.

	(1) Sailing.	(2) Steam.	(3) Total.
First six years....	1.32 2/3%	.68%	.92 1/2%
Last six years.....	1.62 1/2%	.55 1/3%	.85 1/2%

Per cent of lives lost by wreck or casualty excluding Lascars and those who were not employed during the whole of the year.

	(1) Sailing.	(2) Steam.	(3) Total.
First six years....	.80 1/3%	.40%	.56 1/3%
Last six years.....	1.12 1/3%	.29 1/2%	.54 1/2%

Per cent of deaths by all accidents compared with number employed, but excluding Lascars and those who were not employed during the whole of the year.

	Total.
First six years.....	79 1/2%
Last six years	74 1/3%

Percentage of tonnage attended with loss of life to total tonnage employed (excluding Lascars and those not employed during the whole of the year).

	(1) Sailing Vessels.	(2) Steam.	(3) Total.
First six years..	2.33 1/3%	1.51 1/6%	1.84 1/3%
Last six years...	2.78 1/3%	1.32 5/6%	1.79 5/6%

From these tables we perceive (1) that the percentage of

loss on sailing vessels is much greater than that on steamers. (2) That though the loss on sailing vessels has increased in the last six years, the loss on steamers has been so much diminished that there is a material diminution of the percentage of total loss.

B. Vessels Lost.

Percentage lost to employed.

	Total Loss Sailing.	Loss of Steam.	Total Loss.
1st six years,	3.21 1/3%	2.64 1/3%	3.01 1/2%
Last " "	3.29%	2.10 1/3%	2.77 1/3%

These figures are taken from the official abstracts of the Returns to the Board of Trade, printed by direction of Parliament, in 1896.

The following extract from a recent report (June 4, 1896) of the Committee appointed by the Board of Trade to inquire into the manning of British merchant ships, contains a summary for a different period (page 45) :

41. "The great reduction in the loss of life at sea, especially in steamers, which is happily observable in recent years, shows that the necessity for further restrictive legislation has dissapeared. In the quinquennial period ending 1880, the annual average loss of lives of crews of steamers by wreck or casualty numbered 466 on a gross tonnage of under two millions, whilst for the five years ending 1894 it has averaged barely over 400 on a tonnage exceeding ten millions."

This Committee differed as to whether or not additional legislation was expedient, in reference to the manning of British ships. The minority dissented on the ground that existing legislation was sufficient and also on the ground that the nations of continental Europe were less exacting in their requirements than the British Parliament had been. But the correctness of the above statement in the minority report was not contested by any one.

In an account of the annual meeting of the English Chamber of Shipping, held at London in February, 1897, the following paragraph occurs:

"The question of loss of life at sea is one which must always be to the fore in the mind of every one who takes the least interest in shipping. It is good, therefore, to know that spite of the crowded state of traffic along our coast, there has been a steady decrease during the last ten years in the percentage of loss of life at sea. Shipowners would like to see this still lower, and the president voiced the feeling of the whole meeting when he asserted that any well-considered scheme to reduce loss of life still further would have their warm support and approval."
—Commerce. London, Feb. 24, 1897.

THE PRINCESS.

(Referred to at p. of Brief.)

Reichs-Gericht; Civil-Sachen (Imperial Court. Civil Cases), Vol. 25, page 104 *et seq.*

Is it a part of the seaworthiness of a vessel provided by the shipowner and carrier that she shall be provided with the requisite (garnier) dunnage.

H. G. B. (Handels Gesetz-Buch) 481, 560.

The exemption of the carrier under the bill of lading, in respect of the fault (verschuld) of the master and mariners in distinction from the fault of the carrier himself or any of his general agents, except the master.

I.—Civil Senate—Decision of May 25, 1889, in the matter of I. H. B. *et al*, defendants, against Captain R. as commander of the steamer Princess, plaintiff.

I.—Local Court (Land Gericht) at Bremen.

II.—Court of Appeal at Hamburg.

The plaintiff, who brought on the steamer *Princess*, commanded by him, a cargo of cotton from Galveston to Bremen, demands, in his capacity as master, in a suit against the consignees of different portions of the cargo, payment of the freight payable on each lot. The amount of freight is not disputed. But the defendants replied setting up counterclaims against the plaintiff, which have not been sustained by the Courts of first and second instance.

The appeal of the defendants is dismissed.

For the reasons:

"The judgment appealed from has for its subject counterclaims which the defendants supported by the contention that they had suffered substantial damage from the fact that a large number of bales, forming part of the cotton consigned to them, had been injured by dirt in the bottom (boden) of the ship and by sea water, in consequence of the want of dunnage.

The defendants demand of plaintiff compensation for the diminution in value of these bales caused by absence of dunnage and by neglect to clean the ship's bottom (boden), and also for the expense caused them by the inspection; alleging that it was the duty of the shipowner to provide sufficient dunnage.

The plaintiff denies this claim, He maintained that he was ignorant of the alleged injury, and declared that he had provided permanent dunnage (festes garnier), which, however, might not have sufficed to protect the cotton from dirt; that the vessel could not be made liable for the damage, as the equipment of the vessel was good and sufficient, and finally that the real question in the case was that of the default of the ship's company, for which by the bills of lading the ship was not liable.

Such bills unquestionably all contained the clause "Negligence or default of pilot, master, mariners, engineers or other persons in the service of the ship, whether

in navigating the ship or otherwise * * * excepted." The Court of first appeal found that movable dunnage had not been provided to protect the cargo sufficiently from the bilge water and dirt of the ships bottom, and that (as the defendants themselves were evidently convinced in the Court of first instance), the cause of damage was clearly to be found therein. According to this finding of fact, to which no exception was taken, and which is therefore binding on the Appellate Court, the Court of first appeal adopted the reasons for which the Court of first instance had held under the bill of lading before the Court that the plaintiff was not liable to the consignees of the cotton mentioned in the bill of lading, for any damage of this kind, which was caused by the fault or negligence of the captain.

In this no rule of law is violated. The Land-Gericht in its reasoning justly began with this premiss, that the suit is brought, not by Captain R. personally but in his capacity as representative of the owner and carrier, and that the counterclaim in question is made against such owner and carrier. Then the Land-Gericht refutes the contention of defendants that it was the duty of the owner to provide proper dunnage by the sufficient argument that although by Article 50 of the H. G. B. the carrier must furnish the vessel in seaworthy condition, yet that the lack of dunnage or defective dunnage does not impair the seaworthiness of the vessel. The duty imposed by said article upon the carrier is indeed altogether general. For although by a vote taken upon the first reading (see Protocol, p. 2066), the words "and its equipment" (geredschaft) following the word "ship" in Article 470 of the Prussian bill (Entwurf) were stricken out, this was done solely for the purpose of giving the article a more general scope and of preventing the inference that it did not extend to,

the sufficiency of other appurtenances of the ship. It therefore certainly belongs to the seaworthiness of the vessel that all instruments and appurtenances which the ship needs in order to be able to enter upon and complete a given voyage shall be provided and in proper condition. The dunnage, however, is not intended to protect the vessel or to enable it to resist winds and waves in stormy weather; but it consists in appliances by which the cargo is to be protected from the sea water, which, as experience shows, enters the ship's hold under ordinary circumstances, and also against contact with the dirt that may be on the bottom, so that there may be seaworthiness of the vessel, though the proper dunnage be absent.

The stowage of goods is a different matter. For by this there is to be prevented; not only injurious effects of the various articles upon one another, and the shifting of the freight by the motion of the vessel and the injury thereby threatened to the goods, but there is also to be secured that proper trim of the vessel requisite for safe navigation; and the prevention of lateral shifting of the cargo which would threaten danger to the vessel. From all which it results that by insufficient or improper stowage the seaworthiness of the vessel may under some circumstances be impaired.

While then the Land Gericht correctly finds that by Article 481 of the H. G. B., it was the captain who should have taken care to have the vessel provided with the proper dunnage, it does not fail to recognize that the owner and carrier, although he is not chargeable with any fault of his own, nevertheless would be liable for the damage in question if he were not by the bill of lading exempted from such liability. Finally if this last-mentioned exemption is approved, in this also no violation of any rule of law can be found, because the damage is to be traced to an error of the capain, for which error by the

clause of the bill of lading above quoted, the vessel is not liable.

The Court of First Appeal adds very properly that though the exemption from all consequences of "negligence or default of pilot, master, mariners, &c." be exceptionally far reaching, yet no objection can be made to it because of the principles of German law as to freedom of contract. This has been affirmed recently in a decision of the Civil Senate of the Imperial Court (Reichs Gericht) Feb. 6, 1889, in the matter of the German National Bank *et al.*, against Captain W.

To conclude, there can be no doubt as both the lower Courts held, that in the determination of the duty of a captain under the bills of lading to be performed in a German port, the German law must govern.

If finally the appeal is sought to be maintained on the ground that in the above-mentioned decision the Imperial Court did not allow the exemption of the owner from the claims of the consignees, upon a clause in the bill of lading precisely similar, this also appears to be irrelevant. For in that case the decision rests upon the principle of law that the owner cannot claim protection under such a clause of exemption, so far as he himself or some general agent other than the captain is at fault; and also on the finding that this was the fact in that case, because the injury to the cotton had arisen by an improper method of stowage usual in Galveston, which was known to the owner's agent in Galveston (by whom the bills of lading were signed) and ignorance of which on the part of the owner would involve culpable negligence. There is no ground whatever for finding any such personal fault of the plaintiff--owner in the present case."